Tentative Rulings for August 10, 2000
Department 72

There are no tentative rulings for the following cases. The parties should appear at the hearing.

600122-6 Bingham v. Brewer

631502-2 Gunner v. Golf West Companies

635625-7 Wanamaker v. Cabrera

642557-3 Aguirre v. Upright, Inc. et al.

640153-3 Washington Mutual Bank v. Olson

652937-4 In re: Hickingbottom

653714-6 In re: Ezeibe

654152-8 In re: Clark

(Tentative Rulings begin at next page)

Tentative Ruling

Re: ***Baker v. Interim Healthcare, Inc. et al.***
Superior Court Case No. 636982-1

Hearing Date: August 10, 2000 (Dept. 72)

Motion: Summary Judgment and/or Summary Adjudication

Tentative Ruling:

To grant Interim's motion for summary judgment. To deny the plaintiffs' request for a continuance.

The evidence in the instant case shows that the plaintiffs' claims against Interim in the 1st, 2nd, 4th and 5th causes of action are based on the claim that Zeigen was acting within the course and scope of his employment. Fact 10, FAC ¶14, 22, 33 and 45. Interim has shown an absence of evidence to support the claim that Zeigen was acting within the course and scope of his employment when he allegedly sexually molested Kevin. Interim provides in-home nursing care. Fact 2, Decl. of Zentmyer, ¶1. Zeigen was assigned to give nursing care to the twins. Fact 3, Decl. of Zentmyer, ¶6. Interim's policy prohibited providing care to other minors in the home or providing baby-sitting. Fact 6, Decl. of Zentmyer, ¶7. Zeigen allegedly sexually molested Kevin. Fact 8, FAC ¶8, 16 & 32. All of the plaintiff's causes of action are based on the molestation. Fact 9, FAC ¶11, 19, 23, 32, & 41. The sexual molestation by Zeigen was not within the course and scope of his employment. Fact 11, ***Lisa M. v. Henry Mayo Newhall Memorial Hospital*** (1995) 12 Cal.4th 291, 297 and the Decl. of Zentmyer, ¶10.

Based on the evidence before the court, it does not appear that Zeigen was acting within the course and scope of his employment when he sexually molested Kevin. The evidence shows that the employment brought Zeigen and Kevin together. That the employment brought tortfeasor and victim together in time and place is not enough. ***Id.*** at 298. There must be an additional link, i.e. the incident leading to injury must be an "outgrowth" of the employment, the risk of tortious injury must be "inherent in the working environment" or "typical of or broadly incidental to the enterprise [the employer] has undertaken". See ***Id.*** at 298 and cases cited therein. Further, the tort must be foreseeable from the employee's duties. Foreseeability means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. ***Id.*** See also ***Hinman v. Westinghouse Elec. Co.*** (1970) 2 Cal.3rd 956, 959.

There is no evidence of any additional link. Zeigen was at the home to provide care to the twins. Zeigen was not to provide any care to Kevin. The injury was not an outgrowth of the employment or incidental to the employment. There is no evidence that the intentional tort committed was foreseeable.

The burden shifts to the plaintiffs to raise a triable issue as to whether Zeigen was acting within the course and scope of his employment. CCP §437c(o)(2). The plaintiffs have failed to meet this burden. The additional facts show that Zeigen was an employee and agent of Interim on August 13, 1998. See Plaintiff's Facts 3-4, Decl. of McClelland, Exh. A & B, interrogatories 1 and 5. This fails to raise a triable issue as to whether Zeigen was acting within the course and scope of his employment.

Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when the facts are undisputed and no conflicting inferences are possible. See ***Mary M. v. City of Los Angeles*** (1991) 54 Cal.3rd 202, 213 and ***Lisa M. v. Henry Mayo Newhall Memorial Hospital*** (1995) 12 Cal.4th 291. In the case at bar, the plaintiff has failed to point to a factual dispute that would prevent the court from deciding the applicability of respondeat superior as a matter of law.

The 3rd cause of action alleges negligent hiring and employment against Interim. Where an employee causes harm to a third party, his or her employer can be held liable for negligent hiring if the employer knows that the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring the employee**.** ***Evan F. v Hughson United Methodist Church*** (1992) 8 Cal App 4th 828, 10 Cal Rptr 2d 748. The undisputed facts show that Interim did not know, nor did they have reason to believe that hiring Zeigen would pose a risk to children. Interim verified Zeigen's nursing license and references. Fact 13-5, Decl. of Zentmyer, ¶2-4. All reference checks were positive. Fact 16, Decl. of Zentmyer, ¶3. Zeigen had no criminal record at the time of the Baker incident. Fact 17, Decl. of Kurtock, Exh. B, Clovis Police Report, page 7. Interim received no complaints that Zeigen acted in a sexually inappropriate manner prior to the Baker incident. Fact 18, Decl. of Zentmyer, ¶8. Interim had no knowledge of any police investigation of Zeigen prior to the Baker incident. Fact 20, Decl. of Zentmyer, ¶9. Interim had no knowledge or reason to believe that Zeigen may be unfit. Fact 22, Decl. of Zentmyer, ¶8-9. See also ***Roman Catholic Bishop v. Superior Court*** (1996) 42 Cal.App.4th 1556. There is no evidence to suggest that Interim knew or should have known that Zeigen could pose a threat of molestation. There is no evidence that after Zeigen was employed by Interim they became aware of any conduct that would warrant his

termination or further investigation of his fitness to work as a nurse. There is evidence that a complaint was filed against Zeigen in September of 1997. Decl. of Zentmyer, ¶9. There is no evidence to suggest that Interim was aware of the complaint or should have been aware of the complaint.

The burden now shifts to the plaintiffs to raise a triable issue as to whether Interim was negligent in hiring and employing Zeigen. CCP §437c(o)(2). The plaintiffs have failed to meet this burden. The additional facts set out by the plaintiffs show that within a year of Zeigen's beginning employment, a report was made regarding Zeigen to the Fresno Police Department and Interim was unaware of the report. Plaintiff's Facts 8-9, Decl. of Zentmyer, ¶9. Prior to August 13, 1998, Interim had received a request the Zeigen be transferred for personality reasons without any attached complaint. Plaintiff's Fact 10, Decl. of Zentmyer, ¶8. These facts fail to raise a triable issue as to whether Interim knew or should have known that Zeigen was an unfit employee or had a propensity to molest children. There is simply nothing before this court that shows that the transfer request was enough to put Interim on notice that Zeigen could be a child molester. Nor are there any facts or evidence to show that Interim should have been aware of the report made to the police in September of 1997. There is no evidence that shows that the filing of the report in anyway should have put Interim on notice that Zeigen may be a child molester.

The court denies the request for a continuance made pursuant to CCP §437c(h). The plaintiffs have failed to provide the necessary evidence to support a continuance of the motion. See CCP §437c(h) and ***Roth v. Rhodes*** (1994) 25 Cal.App.4th 530, 548.

Numerous evidentiary objections have been made to the evidence submitted. The court declines to make formal rulings on each of these objections. The court has considered only admissible evidence in ruling on this motion. ***Biljac Associates v. First Interstate Bank*** (1990) 218 Cal.App.3rd 1410.

Pursuant to CRC 391(a) and CCP §1019(a), no further written order is necessary. The minute order adopting the tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re: ***MSI Insurance Co. v. Helena Chemical Co.***
Case No. 644497-0

Hearing Date: August 10th, 2000

Motion: Defendant's Demurrer to Second Amended Complaint

Tentative Ruling:

Tentative Ruling:

To sustain the demurrer to the entire second amended complaint on the grounds that the claims are not ripe for adjudication. To overrule the demurrer to the first and second causes of action on the grounds of failure to state a cause of action. To sustain the demurrer to the fourth cause of action on the grounds that it is barred by statute. The court grants Plaintiffs leave to amend.

The Plaintiffs' claims for indemnity and contribution are not yet ripe for adjudication, since Plaintiffs have not paid the judgment against them. CCP § 875 specifically requires that the right of contribution may be enforced "only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof." CCP § 875.

The complaint does allege facts sufficient to state a cause of action regarding the first and second causes of action, since it alleges the existence of a valid contract, Plaintiffs' performance of the contract, a breach by Defendant, and that the breach caused Plaintiffs' damages. Therefore, the court overrules the demurrer to the first and second causes of action on the grounds of failure to state sufficient facts to constitute a cause of action.

However, the fourth cause of action is expressly barred by statute, since Plaintiffs have failed to allege that indemnity is not available. CCP § 875 (f) states that "where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them." Therefore, Plaintiffs cannot claim that they are entitled to indemnity and at the same time claim that they are entitled to contribution.

Plaintiff is granted 10 days to file a third amended complaint. All new allegations are to be set in **boldface**.

Pursuant to CRC 391(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re: ***Abbate v. Everton***
Superior Court Case No. 633490-8

Hearing Date: August 10, 2000 (Dept. 72)

Motion: Demurrer to second amended complaint

Tentative Ruling:

To overrule, with defendants granted 10 days' leave to answer.

While there appears to be some overlap in the allegations in the two cases, the parties and the causes of action are not identical. (Code of Civ. Proc. §430.10(c); Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal.App.3d 781, 789 [274 Cal.Rptr. 147, 151]; Bush v. Superior Court (1992) 10 Cal.App.4th 1374, 1384 [13 Cal.Rtpr.2d 382, 388].) Defendants have offered no legal authority for the proposition that the primary rights of plaintiff in her role as trustee of the RAC and as executor of the estate, are identical to her primary rights as an individual owner of entities in which had a controlling or substantial interest.

It does not appear that a defendant may demur to or move to strike portions of the same complaint after the time to answer has passed. (Code of Civ. Proc. §§430.40, 435(b).)

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re:	***Estate of William S. Andrews v. AIG Insurance Co.*** Superior Court Case No. 645173-6
Hearing Date:	August 10, 2000 (Dept. 72)
Motion:	By defendants to deem requests for admission (set one) admitted, compel initial responses to special interrogatories (set one), form interrogatories (set one) requests for production of documents (set one), for production of documents (set two), and for monetary sanctions

Tentative Ruling:

To grant the motion, in part, ordering plaintiffs to serve a verified written response to requests for production of documents (set two) and to produce all documents within 10 days of service of the order, and to deny the remainder of the motion as moot, because responses were served and any deficiencies therewith must be the subject of a motion to compel further responses. To grant defendants' request for monetary sanctions against attorney David Gilmore only, in the amount of $1,200.00, payable to defendants' attorneys within 30 days of service of this order. (Code of Civ. Proc. §§2030(l), 2033(l), 2031(k), (n).)

Where a verification is required, an unverified response is the equivalent of no response at all. (Appleton v. Superior Court (1988) 206 Cal.App.3d 632, 636 [253 Cal.Rptr. 762, 764].)

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re: **Castellon v. Reintjes**
Superior Court Case No. 618726-4

Hearing Date: August 10, 2000 (Dept. 72)

Motion: Of Defendant for Summary Adjudication of the Second, Third, Fifth, and Sixth Causes of Action of the First Amended Complaint

Tentative Ruling:

To deny the motion in its entirety.

The court notes at the outset that the procedural deficiencies inherent in defendant's initial motion for summary adjudication, heard on July 14, 2000, and as reflected in the court's ruling on that date, have essentially been cured.

However, other serious deficiencies exist in the current motion. As to defendant's motion for adjudication of each cause of action, he has failed to demonstrate the materiality of the facts listed in his "Separate Statement of Facts" by identifying in his motion how these specific facts apply to the specific issues raised in the complaint and how they entitle defendant to judgment as a matter of law. (***Juge v. County of Sacramento*** (1993) 12 Cal.App.4th 59, 67-68.) That is, defendant has only recited the facts presented by the Separate Statement in the "Factual Summary" of his memorandum of points and authorities. He has failed to make specific reference to any of these facts in his substantive arguments. It appears to the court that many of the facts listed in the Separate Statement may be completely immaterial to the issues, but absent reference to these specific facts and a demonstration of their materiality by defendant, the court would have to make too many assumptions. Where it appears that defendant might have referenced a particular fact, he did not direct the court to where that fact could be found in the Separate Statement. For example, defendant presents 12 facts in support of his motion for adjudication of the 2nd Cause of Action for battery. Yet it appears that only one of these facts is utilized in defendant's argument, that plaintiff admits that she agreed to the treatment proposed by defendant. (The court assumes that this is Fact # 5, although defendant does not specifically reference that fact in his argument.) Defendant also makes the statement in his argument that "the treatment [plaintiff] received was the same she was offered." However, he fails to advise the court which facts demonstrate this assertion. Further, defendant has incorporated the same argument for both the 2nd and 3rd Causes of Action. Yet there are 19 facts listed in

defendant's Separate Statement in support of his motion to adjudicate the 3rd Cause of Action, seven of which are different from those presented as to the 2nd Cause of Action, and none of those facts are specifically referenced in defendant's argument or even, apparently, discussed. Defendant's points and authorities are replete with statements like "these facts do not support a fraud claim as to these alleged representations," and "the acts stated in this case are simply not unlawful and are not the type subject [to] the act," but defendant fails to identify which facts support these arguments.

As the court in ***Juge v. County of Sacramento, supra,*** held, "in alleging `material facts' which the moving party contends are undisputed, it is incumbent upon the moving party to show the materiality of the facts by identifying, in the summary judgment pleadings, how the undisputed facts apply to the specific issues raise by the complaint . . . and how they entitle the moving party to judgment as a matter of law . . . Otherwise, the trial court would have the onerous burden to detect all the issues presented by the complaint . . . and then to search through the allegations of undisputed material facts and identify the legal significance of each fact just in case that significance has been overlooked by the moving party. This is not the duty of the trial court." (***Id.*** at pp. 67-68.)

There are additional deficiencies noted by the court. First, there is no legal support for defendant's argument relating to the 3rd Cause of Action for Breach of Fiduciary Duty. That is, it appears that defendant may have argued one possible element of such a claim (relating to consent), but he has given no legal basis or support for his apparent argument that this claim, in this case, has no merit.

Second, much of defendant's argument may have been proper to support a demurrer or a motion for judgment on the pleadings, but has no relevance to a motion for summary judgment or summary adjudication. As one example of many, defendant argues that "as to the fraud claim as a whole, it is subject to summary adjudication because it is not pled with sufficient specificity." This is an argument that defendant should have made on demurrer, not here.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re: ***Juarez-Salazar v. Collectibles Management Resources***
Superior Court Case No. 650111-8

Hearing Date: August 10, 2000 (Dept. 72)

Motion: Demurrer

Tentative Ruling:

To overrule the demurrers to the first, second and fifth cause of action, and to sustain to the third cause of action, with 10 days' leave to amend. (Code of Civ. Proc. §430.10.)

Judicial notice is limited to matters that are indisputably true, and here, the contents of the documents sought to be judicially noticed are disputed. (Code of Civ. Proc. §430.10; *Sosinsky* v. *Grant* (1992) 6 Cal.App.4th 1548, 1565 [8 Cal.Rptr.2d 552, 562-562].) The first and second causes of action for violation of the state and federal Fair Debt Collection Practices Acts state facts sufficient to constitute causes of action. (Civ. Code §1788.13; 15 U.S.C. 1692(k).)

The conduct which formed the proper purpose behind third cause of action for abuse of process, although allegedly wrongful, was not to obtain a collateral advantage over plaintiff. (*Spellens* v. *Spellens* (1957) 49 Cal.2d 210, 232, 233.)

The fifth cause of action for negligence, by incorporation of the prior paragraphs into this cause of action, pleads a cause of action under the negligence per se doctrine based on statutory debt collection duties. (Evid. Code §669.)

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order, and the time in which the complaint can be amended will run from service by the clerk of the minute order.

Plaintiff is ordered to prepare the first amended complaint showing all new allegations and language in **bold** type.